

**UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK**

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SPACE AGE ALARMS, INC.,

Plaintiff

-against-

**THE BOARD OF EDUCATION OF THE WHITE
PLAINS CITY SCHOOL DISTRICT, MICHAEL
J. LYNCH AND ALARM SPECIALISTS, INC.**

Defendants.

)
)
) Civil Action No. 07 CV 7606
) (CLB) (MDF)
) **ECF CASE**
)
)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE JUDGMENT

(Fed. R. Civ. P. 60(b) (1))

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Statement of facts

This matter is now back before this Court on remand from the Second Circuit pursuant to its mandate entered on June 26, 2008.

The Court had entered a final Judgment on March 13, 2008 dismissing the complaint and closing out the case without giving the plaintiff leave to amend the complaint after the Court had twice stated at oral argument on the motion that it would give the plaintiff leave to amend.

After the plaintiff filed its Notice of Appeal on April 9, 2008, the parties entered into a Stipulation to remand the case to this Court. The stipulation was "So Ordered" by the Second Circuit on June 26, 2008.

By a Memo Endorsed Order filed on June 13, 2008, but not entered until June 27, 2008, this Court had earlier indicated it would grant the instant Rule 60(b) motion.

Plaintiff received ECF notice of the entry of this order on June 27, 2008.

Plaintiff did not request leave to amend the complaint in this motion because the research of Plaintiff's counsel indicates that Plaintiff may not seek affirmative relief in the same motion that requests relief from the judgment. However should the Court grant leave to amend as well, Plaintiff will submit a separate motion along with a proposed amended complaint as instructed by the Court.

Since the Court has already indicated that it will grant the Rule 60(b) motion, this memorandum will necessarily be brief.

ARGUMENT

This case is currently before the court after appeal by following the procedure outlined in Toliver v. County of Sullivan, 957 F. 2d 47, 2d Cir. 1991. That procedure is now the subject of a proposed amendment to the Federal Rules of Civil Procedure¹.

¹ See proposed new Rule 62.1 which is "is based on procedures followed in almost all circuits when a motion is made that the district court cannot grant because an appeal is pending. The proposed new rule makes such a procedure explicit in the rules, providing clarity and consistency. Under the proposal, the district court may defer decision, deny the motion, or state either that it would grant relief if the court of appeals remands or that the motion raises a substantial issue. The proposed new Civil Rule is integrated with the parallel proposed new Appellate Rule 12.1." **REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Agenda E-19 Rules September 2007 at 21.**

Rule 60(b) provides in pertinent part:

Relief from a Judgment or Order

...

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

...or

(6) any other reason that justifies relief.

USCS Fed Rules Civ Proc R 60

Respectfully, Rule 60(b) (1) also encompasses mistakes made by the Court. The Second Circuit rules that legal error is "mistake" correctable under Rule 60(b) (1). 12-60 Moore's Federal Practice - Civil § 60.41, (n51) Footnote 40; (n67) Footnote 55. (Matthew Bender 3d Ed., 2008), citing Tarkington v. United States Lines Co., 222 F.2d 358, 360 (2d Cir. 1955) ("Since the doctrine of the Petterson case conflicts with the cases on which the trial judge relied in directing a verdict, the trial judge should have treated plaintiff's motion as a motion under Fed. Rules Civ. Proc. rule 60(b) ... to correct a mistake of the court."

The inadvertent mistake of this Court by rendering judgment and closing out the case in view of the fact that the Court had twice stated that it would give the Plaintiff leave to emend should fall within the category of correctible mistakes. If not, then the Court may consider relieving the Plaintiff from the operation of the judgment under Rule 60(b)(6) ("Rule 60(b)(6) ... grants federal courts broad authority to relieve a party from a final judgment ... provided that the motion ... is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).") 12-60 Moore's Federal Practice - Civil § 60.48, n.5(Matthew Bender 3d Ed., 2008).

Rule 60(b) is available only to set aside a prior order or judgment; a court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment. 12-60 Moore's Federal Practice - Civil § 60.25, n. 1. (Matthew Bender 3d Ed., 2008).

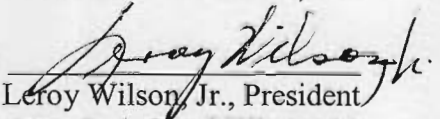
CONCLUSION

Based on the foregoing facts and argument, the Court should vacate and set aside the March 13, 2008 judgment and re-open the case.

Dated: White Plains, New York
July 11 2008

Respectfully submitted,

WILSON JACOBSON, P.C

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CERTIFICATE OF SERVICE

Leroy Wilson, Jr., Esq., President of Wilson Jacobson, P.C. attorney for Plaintiff herein, duly admitted to practice law in the State of New York, hereby affirms under penalties of perjury and hereby certifies that on the date set forth below, he served the below described papers upon the below listed person(s) at the address (es) listed below by mailing to them a true copy of said papers by regular first class mail, postage prepaid, in a sealed envelope at a depository maintained by the U.S. Postal Service within the City of White Plains, New York.

Papers served each dated July 11, 2008:

- (1) Notice of Motion
- (2) Motion for Relief From Judgment
- (3) Declaration of Leroy Wilson, Jr.
- (4) Memorandum of Law

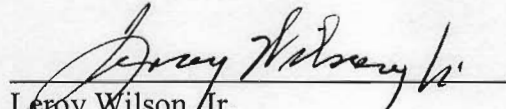
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Date Mailed: July 10, 2008

Dated: July 10, 2008


Leroy Wilson, Jr.